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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

MICHAEL LYNN SMITH,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than twenty-five thousand lawyers, including representatives of every state. The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers.

Among the NACDL's objectives is the promotion of the proper and constitutional administration of criminal justice. Consequently, the NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of this organization's

objectives, and of the criminal justice system, is the protection and preservation of the traditional independence of the Judicial Branch of government. The NACDL is acutely concerned about any decision that would weaken the independence of the Judicial Branch of government, as would the adoption of the position taken by the government in the present case.

The Amicus Curiae Committee of the NACDL has discussed this case and determined that the issues are of such importance to defense lawyers throughout the nation that the NACDL should offer its assistance to the Court. Without necessarily endorsing our positions, all parties have consented to the filing of this brief pursuant to Rule 36.2 of the Rules of this Court: Honorable Kenneth W. Starr, Solicitor General of the United States, on behalf of respondents and

N. Reese, Bagwell, Jr., Defender for Michael Lynn Smith, on behalf of petitioner. Letters of consent are on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The Order of the Chief Judge was plainly correct. The constitutional principle of the separation of powers has been violated, first by Congress in making a broad and undirected delegation of rule-making authority to a single individual and thereafter by the Chief Justice in promulgating security procedures which give the Executive Branch the sole right to determine who may be employed by the Judicial Branch in the trial of cases of this kind.

ARGUMENT

I. CONGRESS HAS IMPERMISSIBLY DELEGATED LEGISLATIVE AUTHORITY TO THE CHIEF JUSTICE.

The power to legislate was explicitly given to the Congress of the United States. Article I, Section 1 of the Constitution provides in pertinent part:

> [a]ll Legislative Powers herein granted shall be vested in a Congress of the United States.

U.S. Const., Art. I, Section 1.

Congress cannot generally delegate its legislative power to another branch of government. Field v. Clark, 143 U.S. 649 (1892).

Under certain narrowly drawn circumstances, however, Congress may delegate its power to prescribe procedures for the federal courts to the Federal Judiciary itself. Rules Enabling Act of 1934, 28 U.S.C. § 2072.

In delegating congressional authority to a coordinate branch of government, Congress must however:

> Lay down by legislative act an intelligible principle to which the person or body authorized to [exercise a delegated authority] is directed to conform ....

J.W. Hampton, Jr. and Co. v. United States, 276 U.S. 394, 409 (1928).

Such delegations of Congressional power are constitutionally sufficient only if:

> Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.

American Power & Light Co. v. Securities Exchange Commission, 329 U.S. 90 (1946) (emphasis supplied).

The Supreme Court itself has of course struck down delegation statutes where Congress provided insufficient standards to confine the discretion of the authorities to whom Congress purportedly delegated power. A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

In contrast, however, where the delegation of Congressional authority is specific and restricted, Congress may delegate its powers to a commission appointed by the Executive and staffed in substantial measure by members of the Judiciary. Mistretta v. United States, 488 U.S. __, 109 S.Ct. 647 (1989).

Speaking for a majority of eight in Mistretta, Justice Blackmun noted that the delegation of authority from Congress to the Sentencing Commission was

constitutional because, among other things, Congress restricted the delegation of authority by specifying (1) three goals for the Commission to meet, (2) specifying four "purposes" of sentencing the Commission should carry out, (3) specifying a specific tool by which to achieve these goals, (4) directing the Commission to consider seven different factors in formulating offense categories, (5) directing the Commission to consider eleven different factors in establishing categories of defendants and, finally, (6) providing detailed guidance about categories of offenses and defender characteristics. Id. at 655-657.

In upholding the constitutionality of this delegation of powers, the Supreme Court noted:

> '...
>
> Only if we could say there was an absence of standards for the guidance of the

> Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose ....'

Id. at 658, quoting with approval, Yakus v. United States, 321 U.S. 414, 425-426 (1944).

In further upholding the delegation of authority in Mistretta, the Court also noted with approval:

> The statute outlines the policies which prompted establishment of the Commission explains what the Commission should do and how it should do it, and sets out specific directives to govern particular situations.

Id. at 658, citing with approval, United States v. Chambless, 680 F.Supp. 793 (E.D.La. 1988).

Section 9 of the present statute is deficient in all these respects. It does not outline the policies which prompted the delegation of authority to the Chief Justice, it does not explain what the Chief Justice should do, nor how he should accomplish it and, finally, it does not set out specific directives to govern particular situations.

Indeed, all that Section 9 purports to do is to delegate to the Chief Justice the unlimited Congressional authority to "prescribe rules establishing procedures for the protection of unauthorized disclosure of any classified information in the custody of the United States District Courts, Courts of Appeal, or Supreme Court." CIPA at Section 9(a).[1]

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[1]Whether the Supreme Court or the Chief Justice has the independent power to make rules for the Judicial Branch of government is a separate issue not presented on the

(continued...)

For the same reasons which impelled the Supreme Court to approve the delegation of authority in Mistretta, this Court should reject the attempted delegation of authority set forth in Section 9 of the Classified Information Procedures Act. Inasmuch as the delegation of authority is overly broad, security

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[1](...continued)
facts of this case. It is clear that the procedures in question here were prepared in response to a Congressional delegation of power and that their promulgation was not an independent act by the Judiciary drawing upon its own powers. See the comprehensive review of judicial rule making set out in Burbank, The Rules Enabling Act of 1934, 130 U.P.L.R. 1015 (1982); see also, Whitten, Separation of Powers: Restrictions on Judicial Rule-Making: A Case Study of Federal Rule 4, 40 M.L.R. 41 (1988); Gallant, Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers, 38 O.L.R. 447 (1985); Levin & Amsterdam, Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revisions, 107 U.P.L.R. 1 (1958).

procedures established pursuant to that authority are invalid.[2]

II. SECTION FOUR OF THE SECURITY PROCEDURES VIOLATES THE SEPARATION OF POWERS.

An independent Judiciary is the cornerstone of the Republic. Any action by the Executive Branch of government that threatens the independence of the Judiciary compromises our system of criminal justice.

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[2]Not only is this delegation of Congressional power impermissibly broad, the fact the delegation is to a single individual, albeit a distinguished one, and the fact that his fiat becomes law within 45 days after he reports to Congress renders Section 9 constitutionally suspect as well. In sum, what Congress has accomplished in Section 9 is a virtually unprecedented delegation of Congressional power to an individual citizen whose report to Congress becomes law within such a brief period of time that the Congressional power of review becomes meaningless. Under these circumstances, Congress appears has abdicated, not delegated, its authority.

While it is true that the Framers did not require the three Branches to be entirely separate and distinct, the three branches must function in such a way that no branch may encroach at the expense of another.

As Madison admonished:

> [T]he greatest security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means and personal motives to resist encroachment of the others.

The Federalist No. 51, P. 349 (J.Cooke ed. 1961).

In consequence, the Supreme Court has regularly noted that the Framers of the Constitution:

> Built into the tripartite Federal Government ... a self-executing safeguard

> against the encroachment or aggrandizement of one Branch at the expense of the other.

Buckley v. Valeo, 424 U.S. 1 (1976).

For this reason, the Supreme Court in Mistretta rearticulated its traditional concern that one Branch not intrude into the affairs of the other:

> It is this concern of encroachment and aggrandizement that has animated our separation of powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power'.. Accordingly we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate branches or that undermine the authority or independence of one or another coordinate branch.

Mistretta, 109 S.Ct. at 659-660 (emphasis supplied).

No provision of law may impermissibly threaten the institutional integrity of the Judicial Branch. Mistretta, 109 S.Ct. at 660, citing with approval Commodity Future Trading Comm'n v. Schor, 478 U.S. 883 (1986).

There can be little doubt that the Security Procedures promulgated by the Chief Justice represent just such an impermissible threat to the institutional integrity of the Judicial Branch.

As the Chief Judge for the Middle District of Tennessee pointed out, the critical deficiency in the Procedures is the fact that the Executive, not the Judicial Branch, ultimately determines which Judicial employees to trust and under what circumstances.

Section 4 of the Security Procedures specifically provides that it is the Department of Justice security officer, not the court security officer, who shall approve clearances and thereby determine who among these Judicial employees may assist the Judge. The Executive Branch therefore determines which law clerks, court reporters, courtroom deputies and secretaries may assist the Judge who hears a case.

As a practical matter, the Executive Branch has become the exclusive master of the House that once belonged to the Judiciary. Since it is the Department of Justice which now determines who may serve the Court, the Executive Branch has encroached upon the institutional integrity of the Judicial Branch in precisely the

fashion warned against by the Supreme Court in Mistretta.[3]

It is important to note that the only other comparable Judicial security regulations, those which govern the Foreign Intelligence Surveillance Court, ultimately assign to the Court, not the Executive Branch, the duty of determining the nature, scope and importance of a security clearance for courtroom personnel. See Security Procedures Established by the Chief Justice for the Foreign Intelligence Surveillance Court and the Foreign

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[3]It is of no constitutional significance that the security regulations in question were promulgated by the Chief Justice at the urging of Congress. It is the effect, not the origin, of the Procedures which is constitutionally significant. In similar fashion, in more ancient times, the Trojan Horse was admitted into the City of Troy at the order of a single distinguished commander. The ruinous effect of that decision was unrelated to the rank of the officer who gave the ultimate command.

Intelligence Surveillance Court of Review at Section 4.

Control is the key. As the Supreme Court noted in upholding the Ethics in Government Act, the Independent Counsel statute did not impermissibly interfere with the Executive control of the prosecutive function because a president could dismiss the independent counsel for "good cause." Morrison v. Olson, 487 U.S. 654, 663 (1988). In the present case, however, the power to remove Judicial personnel now rests in the Executive, not the Judicial Branch of government. It is precisely this lack of control which invalidates Section 4 of the Security Procedures.

It is for Judges, not prosecutors, to ultimately decide who among their judicial employees may hear such cases and under what circumstances. Law

clerks, court reporters, courtroom deputies, and secretaries are not fungible. They are not to be shifted from court to court at the direction of the Department of Justice, as if they were interchangeable parts in the machinery of justice.

Moreover, Chief Judge Wiseman was right to be sensitive to the appearance which Section 4 creates among the public. As the Supreme Court has recently held:

> The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-Partisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of Judicial action.

Mistretta, 109 S.Ct. at 672-673. See also Chandler v. Judicial Counsel, 398 U.S. 74 (1970) ("there can of course, be no disagreement among us as to the imperative

need for total and absolute independence of judges in deciding cases or in any phase of the decisional function.")

In this respect the Chief Judge rightly warned that:

> Allowing the Department of Justice any voice in selection of court personnel dealing with a case in which it is a party offends the most elementary notions of fair play and impartial justice.

Order, at 3.

Likewise, the District Court properly rejected the unpublished views of the Fourth Circuit in In Re United States Department of Justice, No. 87-1205 (4th Cir. April 7, 1988) (App. A-1). In deciding that the CIPA Security Procedures also apply to classified information in a civil case involving the Freedom of Information Act, the Fourth Circuit plainly engaged in judicial legislation of its own

and went well beyond the requirements of CIPA. Moreover, it failed to address the central issue presented by this case, the constitutionality of Section 4.[4]

While Chief Judge Wiseman recognized that the Judicial Branch has as much concern about national security as does the Executive Branch, he rightly recognized that due deference to national security does not require the Judicial Branch to tolerate the kind of massive intrusion into its constitutional functions and prerogatives which is contemplated by Section 4 of the Security Procedures.

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[4]Perhaps for that reason the Fourth Circuit refused publication of what would otherwise be a leading case. Rule 18, Rules of the Fourth Circuit. For the District Court's response to the Fourth Circuit's ruling see Bowers v. United States Department of Justice, 690 F.Supp. 1483 (W.D.N.C.) (declining to require security clearances for judicial personnel).

For these reasons, the Chief Judge in the present case properly refused to permit the Executive Branch of government to subject his courtroom personnel to intrusive personal examination and to determine which of his judicial employees was fit to assist him in the trial of this case.

Section 4 of the Security Procedures issued pursuant to Section 9 of the Classified Information Procedures Act is unconstitutional and this Court should so hold.

III. CONCLUSION

For the reasons stated above, amicus urges the Court to grant the Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-1205

In Re United States Department of Justice,

Petitioner.

ORDER

Before the Court for renewed consideration is a petition by the United States Department of Justice for a writ of mandamus pursuant to 28 U.S.C. § 1651 and Fed. R. App. P. 21. Petitioner initially sought the writ to compel District Judge James McMillan to delay an in camera

inspection of certain classified documents sought by a plaintiff in a civil action brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 until all members of Judge McMillan's staff who would have access for the classified material obtained appropriate security clearances. Judge McMillan had originally declined the Department of Justice's request for security clearances concluding that it was an "extraordinary demand" constituting an unacceptable effort to restrict the court's jurisdiction.

In an order issued on December 30, 1987, this Court withheld issuance of the writ but directed Judge McMillan to reconsider his refusal to order security clearances in light of the significant national interest in preserving legitimate confidentiality. We

specifically directed the district judge's attention to the well-established dedication to national security embodied in this Court's opinion in Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975), as well as in the regulations adopted by the Chief Justice of the United States pursuant to 18 U.S.C. App. § 9.

On January 14, 1988, Judge McMillan issued an opinion announcing that after conducting the reconsideration ordered by this Court, he adhered to his view that he was not required to the FOIA case. This Court then directed that Judge McMillan file a formal response to the petition for mandamus pursuant to Fed. R. App. P. 21. That response has now been filed and the matter is ripe for final disposition.

It is evidence from his response that the district judge continues to view the government's request for security clearances as an improper effort by the executive branch to intrude upon judicial prerogatives. Judge McMillan contends that the rules adopted by the Chief Justice of the United States pursuant to the Classified Information Procedures Act which require security clearance for judicial employees in criminal cases have no precise analogue in civil litigation such as the instant FOIA case. Judge McMillan thus argues that his refusal to delay the FOIA case pending security clearance of his staff is not contrary to any specific statute, applicable rule or controlling authority, and thus cannot be a "clear error" justifying mandamus. We must

disagree with the district judge's assessment.

By relying in part upon a Justice Department executive order to support its initial request for security clearances, the government's pleading may well have been ill advised and even tactless. At this juncture, however, there can be no serious suggestion that this matter involves nothing more than an attempt by the executive branch to restrict the judiciary. The central question properly before us is whether the national interest in preventing unauthorized disclosure of classified material demands reasonable deference from all branches of the government. We are persuaded that it does.

As we noted in our previous order, this Court's concern for potentially damaging disclosure of sensitive and

classified material in the course of the judicial process is well established. See Colby, supra. Moreover, the Supreme Court has consistently held that preserving the secrecy of information important to national security is a matter of compelling interest. See, e. g., Snepp. v. United States, 444 U.S. 507, 509 n.3 (1980).

It is true that Congress has not, to date, specifically provided the same security measure in civil cases that it has mandated in criminal prosecutions. Unlike Judge McMillan, however, we perceive no diminished commitment to national security in Congress' present silence. Logically, the damage attendant to disclosure of classified materials is unaffected by the legal context in which the disclosure occurs. We cannot conclude, therefore, that Congress, by omission, has sanctioned

an irrational distinction between disclosure in a civil case and a criminal prosecution.

Although mandamus is traditionally viewed as the appropriate remedy only in instances of clear error, the writ may also be issued by the Court of Appeals when supervisory control of the district court is "necessary to the proper judicial administration of the federal system." United States Board of Parole v. Merhige, 487 F.2d 25 (4th Cir. 1973), quoting LaBuy v. Howes Leather Co., 352 U.S. 244, 259-60 (1957). We are fully persuaded that such supervisory control is required here. Judge McMillan's refusal to obtain clearances for his staff presents the government with two equally unpalatable alternatives - face contempt sanctions for failure to disclose or by providing

unauthorized persons with access to classified materials, take an action that cannot be remedied by a normal appeal. Requiring routine security clearance for Judge McMillan's staff avoids this dilemma in a minimally intrusive fashion that also adequately guards the undisputed national interest. In reaching this conclusion, we are confident that the relevant clearance procedures will operate in an expeditious manner, thereby avoiding undue delay in the instant litigation.

Accordingly, it is ORDERED that the petition of the United States Justice Department for a writ of mandamus is granted. Pursuant to this order, District Judge James McMillan will not require the production of any classified material with regard to the pending civil litigation until those members of his staff who will

have access to those documents obtain security clearance.

ENTERED this 7th day of April, 1988, at the direction of Judge Hall with the concurrences of Judge Phillips and Judge Sprouse.

JOHN M. GREACEN
Clerk of the Court